UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

COMPLAINT NO. 06-2605-SNOW

UNITED STATES OF AMERICA

vs.

ROLANDO GONZALEZ DELGADO,
HENRICH CASTILLO DIAZ,
and
YAMIL GONZALEZ RODRIGUEZ,
a.k.a. "Amil,"

Defendants.
_____/

GOVERNMENT'S MOTION TO VACATE
THE COURT'S JULY 10, 2006, ORDER

The United States of America, by and through the undersigned Assistant United States Attorney, respectfully submits this Motion to Vacate the Court's July 10, 2006, Order.

I. RELEVANT BACKGROUND

On or about July 8, 2006, at approximately 5:45 a.m., the United States Coast Guard interdicted a vessel carrying 31 Cuban migrants and three crew members. The vessel, an unregistered 36-foot go-fast boat, refused the Coast Guard's orders to stop and instead accelerated in order to evade capture despite rough seafaring conditions. The Coast Guard stopped the vessel near Boca Chica, Florida, following a chase and took the three defendants and 31 Cuban migrants into custody. Currently, one migrant has died and two of the migrants have been landed on American soil due to the need for urgent medical treatment arising from injuries sustained during the transit of the smuggling vessel from Cuba; the remaining 28 migrants are in custody aboard a Coast Guard cutter.

On or about July 10, 2006, a criminal complaint charged defendants under 8 U.S.C. §§ 1324(a)(1)(A)(iv) and (v)(I) and 1324(a)(1)(B)(iv) with encouraging or inducing aliens to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, with said conduct resulting in a death. That day, each defendant made an initial appearance before the Court. The Federal Public Defender's Office argued that it would be virtually impossible to depose or otherwise interview an alien should the government repatriate him or her to Cuba. *See* Order, No. 06-2605-SNOW, at 2 (S.D. Fla. filed July 10, 2006) (hereinafter cited as "Order").[1] The Court stated that "counsel for the defendants [should] have an opportunity to interview the aliens prior to their repatriation." *Id.* Accordingly, the Court ordered that the government "refrain from repatriating any of the 29 migrants who were aboard subject vessel and currently are being held in Government custody until such time as counsel for the defendants have had an opportunity to interview them." *Id.*

At defendants' pre-trial detention hearing on July 14, 2006, the government expressed its concern regarding the Court's authority to issue an order limiting the government's right to repatriate the Cuban migrants. The government indicated that it was not challenging the Court's authority at that time because the government had not reached a decision regarding repatriation. The government stated that prior to a repatriation, it would notify the Court and the defense so that the issue could be addressed and, if necessary, litigated. The Court indicated its willingness to consider this issue at a later date.

[1] The Government did not and does not concede this argument, and reserves its position in future cases with respect to the viability of witness access in Cuba.

The government has determined that it is appropriate to land the remaining 28 migrants pursuant the authority of 18 U.S.C. §3144 to detain material witnesses. The government thus requests that this Court vacate its decision as improperly burdening the Executive's authority to regulate immigration, as lacking support in law because the defense has not demonstrated that repatriation would be in bad faith, or, in the alternative, as moot.

II. ARGUMENT

A. The Court's Order Improperly Burdens The Executive Branch's Authority To Regulate Immigration.

It is axiomatic that the Executive Branch possesses the authority to enforce this country's immigration laws. *See, e.g., Matthew v. Diaz*, 426 U.S. 67, 81 (1976) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government."). As applied to situations where aliens witness the commission of a violation of 8 U.S.C. § 1324, the Supreme Court has observed that "Congress has adopted a policy of apprehending illegal aliens at or near the border and deporting them promptly."[2] *Valenzuela-Bernal*, 458 U.S. at 864.

Congress has expressly provided that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). The entry of

[2] The interdiction of undocumented aliens in the Caribbean region has been in effect since September 1981. *See Sale v. Haitian Centers Council*, 509 U.S. 155, 160-65 (1993); Executive Order 12807, 57 Fed. Reg. 106 (Jun. 1, 1992). The latest Executive Order was issued on November 15, 2002. *See* Executive Order 13276, 67 Fed. Reg. 223 (Nov. 19, 2002).

undocumented migrants by sea has been suspended pursuant to this authority since 1981.[3] Since 1992, the Coast Guard has enforced this suspension through a presidentially-ordered program of interdiction at sea and swift repatriation. *See* Exec. Order 12807, 57 Fed. Reg. 106 (Jun. 1, 1992). In evaluating Executive Order 12,807, the Supreme Court held that "[i]t is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal . . . migrants the ability to disembark on our shores." *Sale v. Haitian Centers Council*, 509 U.S. 155, 187-88 (1993). The *Sale* Court further characterized the interdiction of undocumented migrants at sea as involving "foreign and military affairs for which the President has unique responsibility." *Id.* at 188 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). Accordingly, the Court rejected the challenge to the interdiction and repatriation program established by the President and enforced by the Coast Guard pursuant to Executive Order 12807, which forms the foundation of the Executive Branch's maritime migrant interdiction program.

In this case, in contravention of *Sale*'s well-settled rule, the Order significantly burdens the Executive Branch's obligation to enforce congressional will and prerogative to regulate immigration and repatriate interdicted migrants. Just as a judicial order *requiring* the landing or repatriation of aliens would impinge improperly on the government's ability to execute the immigration laws, a similar order *denying* these actions improperly burdens this fundamental Executive Branch function. Thus, without any kind of showing that repatriation would violate defendants' constitutional rights, *see infra* Section II.B, the restriction against repatriation is without basis in law and is not warranted on the facts.

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[3] *See* Pres. Proc. 4865 (1981) (suspending the entry into the United States of undocumented aliens by sea); *see also* Exec. Order 12,807 (1992) (directing the Coast Guard to take certain measures to enforce the suspension of such aliens, including interdiction and repatriation).

B. The Court's Order Lacks Support in Law Because The Defense Has Not Demonstrated That Repatriation Would Be In Bad Faith.

The Court issued its Order in response to defense counsel's contention that repatriation of the Cuban migrants would eliminate defendants' opportunity to depose or interview the migrants. *See* Order at 2. As a matter of criminal procedure, defense counsel's argument was, in essence, a request for the preservation of evidence. For the Court to order the preservation of evidence, however, defendants must first overcome the *threshold* issue of government bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

In *Youngblood,* the Supreme Court considered a defendant's claim that the government's failure to preserve evidence deprived him of due process of law. The Court determined that any constitutionally-guaranteed right of access to evidence must be based upon a constitutional duty that exceeds the government's existing constitutional duty to disclose favorable evidence to the accused under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See id.* at 56. However, the due process clause did not create a constitutional duty as to the preservation of evidentiary material, "of which no more can be said than that [the evidentiary material] could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. Accordingly, the Court held that, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.*

The analysis relating to a demand for the preservation of evidentiary material applies with equal, if not greater, force in human smuggling cases involving alien witnesses. In *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982), for example, the Supreme Court ruled that the deportation of two alien witnesses, who the defendant attempted to smuggle into the United States in violation of 8 U.S.C. § 1324(a), did not violate the defendant's due process rights where the Executive Branch

determined in good faith that the alien witnesses did not possess any evidence favorable to the defendant in the pending criminal prosecution. *See id.* at 872-73. That the defendant did not have access to the alien witnesses did not alleviate his burden to establish bad faith because, "while this difference may support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a [bad faith] showing." *Id.* at 870.

In *Youngblood*, the defendant attacked his conviction because the government had not preserved certain evidence. Here, defense counsel requested the preservation of evidence on the basis that repatriation would prevent defendants from deposing or interviewing the migrants. However, just as in *Youngblood* and *Venezuela-Bernal*, defendants have not yet established that the evidence is material, exculpatory, or that any failure to preserve the evidence—in this case, by repatriating the migrants—would be in bad faith. *See Venezuela-Bernal*, 458 U.S. at 873 ("A violation of [the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment] requires some showing that the evidence lost would be both material and favorable to the defense.").

Under *Venezuela-Bernal*, defendants' lack of access to the Cuban migrants here does not dispense with their obligation to show bad faith by the government. Other cases decided in this Circuit confirm this conclusion. *See United States v. Diaz*, 156 Fed. Appx. 223, 224 (11th Cir. 2005) (holding under *Venezuela-Bernal* that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor [but] [m]ore than the mere absence of testimony is necessary to establish a violation of the right."); *see also United States v. Schaefer*, 709 F.2d 1383, 1386 (11th Cir. 1983) ("A defendant cannot simply hypothesize the most

helpful testimony the deported witness could provide. Rather, he must show some reasonable basis to believe that the deported witness would testify to material and favorable facts.").

While *Valenzuela-Bernal* addresses the issue of foreign national witnesses deported after being present in the United States, the government is aware of no authority supporting a judicially-imposed requirement to produce foreign national witnesses—who have no lawful right to enter the United States—interdicted and held extraterritorially and whose entry Congress has expressly authorized the President to suspend. *See supra* Section II.A. Indeed, migrant smugglers operating extraterritorially surely cannot be surprised at not having access to the potential foreign national witnesses that they unlawfully bring on their vessels.

Congress clearly anticipated that such witnesses might not be present in the United States for interview, investigation, or trial.[4] It would be perverse if a defendant smuggler could compel the presence in the United States of an undocumented migrant, who, but for the criminal proceeding arising from the defendant's attempted smuggling, would not otherwise be permitted to enter this country.

C. The Court's Order Is Moot In Any Event Because The Government Will Land The Remaining 28 Cuban Migrants On American Soil.

Even assuming, *arguendo*, that defendants are not required to establish bad faith and/or that the Order does not burden the Executive Branch's authority to regulate immigration, the Court should vacate its Order because the government has chosen, under material witness warrants approved by the Court, to land the 28 Cuban migrants on American soil. Because none of the Cuban

[4] *Cf.* 8 U.S.C. 1324 (d) (establishing an exception to the Federal Rules of Evidence and providing for the admissibility of "the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify").

migrants in this case have been or will be repatriated, the Order's ban on repatriation is moot and, consequently, should be vacated.

III. CONCLUSION

Based on the foregoing, the United States of America respectfully moves that the Court vacate its July 10, 2006, Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by facsimile this 20th day of July, 2006, to the following:

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